

STATE OF MICHIGAN  
IN THE SUPREME COURT

ECHELON HOMES, LLC,  
Plaintiff/Counter-Defendant/Appellee,

v.

CARTER LUMBER COMPANY,  
Defendant/Counter-Plaintiff/Appellant,

and

ECHELON HOMES, LLC,  
Plaintiff/Counter-Defendant,

v.

CARTER LUMBER COMPANY,  
Defendant/Counter-Plaintiff.

Docket Nos. 125994 & 125995

Court of Appeals No. 243112

Trial Court No. 01-029345-CZ  
Oakland County Circuit Court  
Judge Eugene Schnelz

Court of Appeals No. 243180

Trial Court No. 01-029345-CZ  
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Judge Eugene Schnelz

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PLAINTIFF ECHELON HOMES'  
BRIEF OPPOSING APPLICATION FOR LEAVE TO APPEAL  
PROOF OF SERVICE

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**COUNTER-STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT**

Carter Lumber does not provide a Statement of Order Appealed From and Relief Sought as required by MCR 7.302(A)(1)(a). Therefore, Echelon Homes cannot comment on this requirement for an application for leave to appeal.

## COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Whether leave to appeal should be denied where the Court of Appeals did not extend or modify existing Michigan law when it held that the Circuit Court properly granted summary disposition on Carter Lumber's "account stated" claim where Carter Lumber presented no evidence of an agreement between Echelon and itself?

Plaintiff/Counter-Defendant Echelon Answers: Yes.

Defendant/Counter-Plaintiff Answers: No.

2. Whether leave to appeal should be denied where the Court of Appeals did not extend or modify existing Michigan law when it held that the Circuit Court properly granted summary disposition on Carter Lumber's claim that Echelon could not be held liable for the unauthorized actions of its employee as an apparent agent where the only evidence of the agency was created by the employee (e.g., Echelon did not hold the employee out as being authorized to act in the manner upon which Carter Lumber allegedly relied)?

Plaintiff/Counter-Defendant Echelon Answers: Yes.

Defendant/Counter-Plaintiff Answers: No.



3. Whether leave to appeal should be denied where the Court of Appeals did not extend or modify existing Michigan law when it held that the Circuit Court properly granted summary disposition on Carter Lumber's "account stated" claim where Carter Lumber presented no evidence to support a claim that Echelon "ratified" the illegal acts of its employee?

Plaintiff/Counter-Defendant Echelon Answers: Yes.

Defendant/Counter-Plaintiff Answers: No.

4. Whether leave to appeal should be denied where the Court of Appeals did not extend or modify existing Michigan law when it held that the Circuit Court properly granted summary disposition on Carter Lumber's claim of "actual" authority where the only evidence of such actual authority was the affidavit of Carter Lumber's counsel claiming an account stated existed?

Plaintiff/Counter-Defendant Echelon Answers: Yes.

Defendant/Counter-Plaintiff Answers: No.

5. Whether leave to appeal should be denied where the Court of Appeals did not extend or modify existing Michigan law when it held that Echelon had presented sufficient evidence to assert a statutory claim for Carter Lumber's aiding and abetting an employee who admittedly stole, embezzled or converted Echelon's property?

Plaintiff/Counter-Defendant Echelon Answers: Yes.

Defendant/Counter-Plaintiff Answers: No.

6. Whether leave to appeal should be denied where the Court of Appeals did not extend or modify existing Michigan law when it held that Echelon had presented sufficient evidence to assert a fraud claim against Carter Lumber where Carter Lumber was alleged to have, at a minimum, recklessly and admittedly signed construction lien waivers to secure payments from Echelon's title company under circumstances where Carter Lumber had no knowledge of ever having delivered goods to the properties for which it was executing lien waivers?

Plaintiff/Counter-Defendant Echelon Answers: Yes.

Defendant/Counter-Plaintiff Answers: No.

7. Whether leave to appeal should be denied where the Court of Appeals did not extend or modify existing Michigan law when it held that Echelon had presented sufficient evidence to assert a claim for aiding and abetting breach of fiduciary duty where Carter Lumber knew that Echelon's employee owed it fiduciary duties and where Carter Lumber assisted the employee in defrauding Echelon?

Plaintiff/Counter-Defendant Echelon Answers: Yes.

Defendant/Counter-Plaintiff Answers: No.

## COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

As an initial matter, the statement of facts provided by Carter Lumber fails to meet the requirements of MCR 7.212(C)(6) as Carter Lumber engages in an open dialogue on issues without citation to the record below. Echelon requests that the Court strike all Carter Lumbers statements not supported by a citation to the record below.

### **I. Carmela Wood**

Carmela Wood ("Wood") was employed by Plaintiff/Appellant Echelon Homes "Echelon" as a secretary, administrative assistant and bookkeeper in April 1997. Hysen Affidavit, ¶ 3, attached as App. Exh. 1.<sup>1</sup> In that capacity, Wood was placed in a position of trust and had access to Echelon's financial books and records, and, more importantly, to Echelon's check book. Hysen Affidavit ¶ 3. Her duties Included tracking bills and expenses and preparing checks for payment of these bills and expenses. Hysen Affidavit, ¶ 3; see Echelon Complaint, ¶¶ 6-7, App. Exh. 2.

### **II. The Fraudulent Scheme Is Discovered**

On July, 7, 2000, Echelon discovered that Carmela Wood had been engaged in a scheme to embezzle funds from Echelon and convert those funds to her own uses. Echelon discovered the fraud when its owners opened the mail while Wood was on vacation. Hysen Affidavit, ¶ 4.

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<sup>1</sup> All exhibits referenced were submitted to the Michigan Court of Appeals and, before that, the Circuit Court.

While she was at work, Wood ordinarily opened all mail. When she was on vacation, Echelon's owners opened the mail. In doing so, they discovered invoices from purported Echelon creditors from whom Echelon had never purchased goods or services. This discovery caused Echelon to investigate Wood's activities, and, as a result of the investigation, Echelon discovered that Wood had engaged in a fraudulent scheme to embezzle monies from Echelon by forging checks, making fraudulent statements, and falsifying other documents (the "Fraudulent Scheme"). Hysen Affidavit, ¶ 4.

Echelon immediately reported the Fraudulent Scheme to the Michigan State Police on the evening of July 7. Hysen Affidavit, ¶ 5.

Wood returned from vacation on Monday, July 10, and when she reported to work, Echelon immediately terminated her employment. Hysen Affidavit, ¶ 6. Wood was arrested by the State Police at that time. Hysen Affidavit, ¶ 7. She eventually pled guilty and was sentenced as a result of her theft from Echelon. *See* Complaint, App. Exh. 2, ¶ 8.

### **III. The Fraudulent Conduct**

The Fraudulent Scheme Included a variety of improper and unlawful acts which Wood, aided and abetted by the others, used to convert or embezzle Echelon's assets.

For example, Wood forged the signatures of Echelon's owners on checks made payable to herself. (Examples of such checks are attached as Exhibit A to the Hysen Affidavit, App. Exh. 1, A .) Hysen Affidavit, ¶ 10(a). Wood also fraudulently

obtained credit accounts with various vendors in Echelon's name by forging signatures on applications and by holding herself out to be authorized to sign contracts on behalf of Echelon, despite the fact that she was not so authorized. (An example of a forged application is attached as Exhibit B to the Affidavit.) Hysen Affidavit, ¶ 10(b). Further, Wood charged supplies and materials on both Echelon's existing accounts and accounts fraudulently opened by herself. (Example of invoices from Carter Lumber are attached as Exhibit G to the Hysen Affidavit, App. Exh. 1, G.) Hysen Affidavit, ¶ 10(b).

Wood converted and used Echelon's materials, money, credit and assets for her own use and benefit as well as the use and benefit of others. Hysen Affidavit, ¶¶ 10-15.

To conceal the Fraudulent Scheme, Wood set up a post office box in Highland, Michigan in the name of Echelon without the knowledge of Echelon's principals to hide billings and statements for fraudulent accounts and unauthorized purchases. Hysen Affidavit, ¶ 10(e).

#### **IV. Carter Lumber Is Deeply Involved In The Fraudulent Scheme And Reaps Substantial Benefits From Wood's Fraud**

##### ***A. Carter Lumber Needs To Generate Business***

Over the last few years, Carter Lumber, particularly its White Lake store, was faced with substantial competition. As a result of this competition, Carter Lumber sought to focus more of its business development activities on the contractor market. Rinks Deposition, pp. 16-17 attached as App. Exh. 3. The White Lake

store manager, Seth Rinks, made himself familiar with the local homebuilders to better understand his target market. Rinks Dep., p. 17.

***B. Carter Lumber Accepts And Approves An Application For Credit From An Unknown Builder's Employee Without Ever Contacting The Owners Of The Building Company***

In March 1999, Carmela Wood submitted an application for credit purportedly on behalf of Echelon Homes, a Brighton homebuilder. Without contacting the alleged signers of this application, Carter Lumber approved the application. See Complaint, App. Exh. 2, ¶ 11 and Application, App. Exh. 4.

This application was approved even though the store manager never heard of Echelon Homes (although he was familiar with the contractors in his area) and even though the manager admitted Brighton, where Echelon is located, is not in the vicinity of his White Lake store. Rinks Dep., App. Exh. 3, pp. 40-41.

***C. Carter Lumber Violates The Terms Of The Phony Application And Allows The Family And Friends Of Wood To Charge On The Fraudulent Account***

After opening the facially suspicious charge account without bothering to ask the owners if they approved the account, Carter Lumber began a program and practice of violating the terms of the charge account. Specifically, the account provided that only certain authorized users could charge on the account. Application, App. Exh. 4. Carter Lumber ignored this provision in its own account application.

Carter Lumber did not even require Wood to appear at the store to obtain goods. Instead, her brother, Ronald Lobenstein, appeared at Carter Lumber and

charged goods to the "Echelon" account. *See* Complaint, App. Exh. 2, ¶ 19; Rinks Dep., p. 60.

Carter Lumber made no effort to confirm through Echelon's owners that Ron Lobenstein was entitled to use the account except to speak with Wood. Rinks Dep., p. 60, App. Exh. 3.

Even the fraudulent application specified who could use the account. If a new user was to be authorized, it stands to reason that only the owners of Echelon could add the additional names. *See* Application, App. Exh. 4. In fact, the application states that Carter Lumber is to call Echelon to verify all other persons using the account. Since only the owners could authorize new users, Carter Lumber could only rely upon a conversation with the owners to add new users.

Incredibly, Carter Lumber allowed Lobenstein to purchase goods on the Echelon account and have the materials delivered to Lobenstein's personal home in Pontiac. Indeed, the store manager admits he was at this home on at least one occasion. Rinks Dep., App. Exh. 3, pp. 42-44.

Not only did Carter Lumber allow Ron Lobenstein to pick-up merchandise from its store on the Echelon account, Carter Lumber also allowed Randy Lobenstein, Ron and Connie's brother, to pick-up materials on the account. Randy Lobenstein Dep., App. Exh. 5, p. 29. When Randy Lobenstein appeared at the store, Carter Lumber gave him the materials without asking for ID even though Randy Lobenstein could not even provide the correct address for Echelon when asked by the Carter Lumber employee. Randy Lobenstein Dep., App. Exh. 5, p. 30.



Undaunted by Randy Lobenstein's lack of information, Carter Lumber loaded the materials into his truck. Randy Lobenstein Dep., App. Exh. 5, p. 31.

Carter Lumber even allowed Paul Lobenstein to obtain goods on the fraudulent Echelon account. App. Exh. 6, Invoice signed by Paul Lobenstein.

***D. Without Contacting The Owners Of Echelon Homes, Carter Lumber Allows An Echelon Employee To Change The Billing Address For Echelon Homes – Which Is Known To Carter Lumber To Be A Brighton Builder With Brighton Offices And A Brighton Phone Number – To A Highland P.O. Box***

Adding to Carter Lumber's failures, Carter Lumber, which knew Echelon was a Brighton company based upon its application, inexplicably changed the mailing address for Echelon to a P.O. Box in Highland. This P.O. Box was controlled by Wood and allowed her to conceal Carter Lumber's billings. Hysen Aff., App. Exh. 1, ¶10(e); App. Exh. 7, Invoice from Carter Lumber with false address.

***E. Carter Lumber Signs Knowingly False Lien Waivers To Obtain Checks From Legitimate Echelon Homes Construction Accounts***

Carter Lumber also assisted Wood in converting funds from legitimate Echelon construction accounts. For example, Carter Lumber accepted a May 1, 2000 check from American Title, which check should have gone to pay legitimate suppliers, that clearly stated it was for work done at 3875 Honor's Way. Carter Lumber cannot produce any evidence that it ever delivered materials to this legitimate Echelon project. Yet, it accepted the check from Wood without question. Rinks Dep., App. Exh. 3, pp. 89-90; Checks, App. Exh. 8. In fact, Carter Lumber accepted two other checks from American Title with particular project designations,

even though Cater Lumber never delivered goods to these jobs. Rinks Dep., App. Exh. 3, pp. 91-92.

It gets even worse. Carter Lumber's manager, Seth Rinks, signed a lien waiver for one of Echelon's legitimate projects representing that Carter Lumber had provided goods to the site and was entitled to payment. However, Carter lumber admits it has no knowledge as to whether its goods were ever used at the location for which it was signing the waiver. Rinks Dep., App. Exh. 3, pp. 92-93 and False Lien Waivers, App. Exh. 9.

As a result of Carter Lumber's actions, "Echelon" became one of the largest credit customers of Carter Lumber's White Lake store even though Carter Lumber never once talked with Echelon's owners.<sup>2</sup> Rinks Dep., App. Exh. 3, pp. 79-80.

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<sup>2</sup> On May 12, 2000, Carter Lumber Increased Echelon's credit line by another \$10,000 to \$35,000 without consulting with Echelon's owners. Rinks Dep., App. Exh. 3, pp. 80-81.

## ARGUMENT

### I. Introduction

Carter Lumber seeks leave to appeal the Court of Appeals March 30, 2004 Opinion in this matter. This request is based entirely upon Carter Lumber's assertions that the facts presented by Echelon cannot, as a matter of law, support the stated claims. That is, Carter Lumber does not suggest that the Court of Appeals misstated Michigan law and that this misstatement will have an impact to Michigan jurisprudence. Rather, Carter Lumber asserts that the admittedly correct legal standards were improperly applied to the facts of this particular case. This Court, consistent with MCR 7.302, should not be inclined to grant leave in cases where a party merely claims evidence, which has yet to be presented to a jury, should never be presented to a jury because it is allegedly insufficient to support a claim. If such cases met the standard for leave, this Court would have to grant leave in virtually every matter.

Notwithstanding Carter Lumber's inability to meet the requirements for leave, reviewing the facts of this case, the Court of Appeals committed no error. Echelon has asserted claims against Carter Lumber for aiding and abetting conversion pursuant to MCL 600.2919a, fraud and aiding and abetting breach of fiduciary duty. These claims are based, in part, upon the following extraordinary misconduct of Carter Lumber such as:

- Signing a lien waiver for a construction project for which Carter Lumber knew it never provided materials (False Lien Waiver, App. Exh. 9);
- Never contacting Echelon's owners when it was asked by the employee to sign the false lien waiver (Rinks Dep., App. Exh. 3, pp. 79-80);
- Accepting a check cut by the title company as a result of the false lien waiver (Checks, App. Exh. 8 and Rinks Dep., App. Exh. 3, pp. 91-92);
- Accepting a check based upon the lien waiver for an amount which surpassed the amount of any single delivery Carter Lumber made;
- Accepting checks from a title company that clearly stated what jobs those checks were for even though Carter Lumber knew it did not delivered goods to those projects (Checks, App. Exh. 8);
- Never contacting the owners when the employee sought credit line Increases (Rinks Dep., App. Exh. 3, pp. 80-81);
- Never contacting the owners when the employee sought to add additional "authorized" users (Rinks Dep., App. Exh. 3, p. 60);<sup>3</sup>
- Sending Carter Lumber invoices to a PO Box in Highland at the request of the employee when Echelon, as stated on its "application," is located in Brighton and Carter Lumber contacted the employee by calling Echelon's Brighton office

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<sup>3</sup> How does an authorized user on another person's account gain the authority to add additional authorized users?

(Invoiced with false address, App. Exh. 7 and Application, App. Exh. 4);

- Never contacting Echelon's owners where the store manager admits Echelon was outside the area of businesses that would typically use his White Lake store (Rinks Dep., App. Exh. 3, pp. 40-41 and 80-81);
- Delivering substantial goods to the employee's brothers' homes (Rinks Dep., App. Exh. 3, pp. 42-44); and
- Allowing unauthorized users to pick-up goods on the account (Lobenstein Dep., App. Exh. 5, pp., 29-31 and Receipt, App. Exh. 6).

This evidence demonstrates, at a minimum, a question of fact exists as to Carter Lumber's participation or assistance to the Fraudulent Scheme.

In response to Echelon's claim, Carter Lumber asserts that Echelon is liable to it for unpaid amounts on the fraudulent credit account established by the employee. Incredibly, Carter Lumber asserts that the employee was vested with the apparent authority to establish the fraudulent account or that Echelon, after discovering the fraud, ratified the false account by testifying at a restitution hearing about the amounts the employee embezzled. Carter Lumber asserts that it presented sufficient evidence on these issues to have the claims proceed to trial. Carter Lumber, as held by the Court of Appeals, is wrong.

In sum, this Court should not grant leave to review what amounts to nothing more than the application of law to fact where the sole issue is whether sufficient evidence has been presented to avoid, or grant, summary disposition.

## **II. Carter Lumber Fails To Meet The Standard For The Grant Of Leave To Appeal**

This is a civil case between two private entities. The Michigan Court Rules provide for leave to appeal to the Michigan Supreme Court to be granted in such a case in only one circumstance. Carter Lumber must show that “the issue involves legal principles of major significance to the state’s jurisprudence.” MCR 7.302(B)(3). Carter Lumber fails to meet this standard.

As the discussion below will highlight, Carter Lumber’s application for leave makes two critical errors. First, Carter Lumber continues to argue that statements made by the Circuit Court were wrong and misapplied the law. These Circuit Court statements, however, are not precedential and have been superceded by the analysis of the Michigan Court of Appeals. Thus, why the Circuit Court ruled as it did is of no relevance to the present application.

Second, Carter Lumber does not claim that the Court of Appeals Incorrectly stated or changed existing Michigan precedent.<sup>4</sup> Instead, Carter Lumber essentially challenges the application of Michigan law to the specific facts of this case. The limited nature of this challenge does not implicate principles of major

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<sup>4</sup> Indeed, there is not a single instance in Carter Lumber’s Application for Leave where it attempts to distinguish a case relied upon by the Court of Appeals.

significance to Michigan jurisprudence as a whole because Carter Lumber's is a fact specific challenge. In other words, Carter Lumber just wants this Court to engage in a *de novo* review of the Court of Appeals' holding, which correctly stated the law, based upon a factual analysis of this case.

In sum, Carter Lumber cannot meet the standard for granting leave.

### III. There Is No "Account Stated" Between Echelon And Carter Lumber

As it did in the Court of Appeals, Carter Lumber launches into a discussion of agency relationships without first providing the background of what must be established to prove its underlying claim: "account stated." In light of this deficiency, Echelon provides a summary of the law for the Court.

An "account stated" results from the conversion of an "open account" to an account in which both parties agree as to amount:

The conversion of an open account into an account stated, is an operation by which the parties assent to a sum as the correct balance due from one to the other; and whether this operation has been performed or not, in any instance, must depend upon the facts. That it has taken place, may appear by evidence of an express understanding, or of words and acts, and the necessary and proper inferences from them. When accomplished, it does not necessarily exclude all inquiry into the rectitude of the account. White v. Campbell, 25 Mich. 463, 468. [Kauntiz v. Wheeler, 344 Mich. 181, 185, 73 N.W.2d 263 (1955)]

It is a "balance struck between the parties on a settlement." Keywell & Rosenfeld v. Bithell, 254 Mich. App. 300, 331, 657 N.W.2d 759 (2002).

In Larsen v. Stiller, 344 Mich. 279, 288, 73 N.W.2d 865 (1955), this Court held that the trial court properly instructed the jury, in part:

Now, the mere rendering of an account is not an account stated. An account stated must be an arrangement consented to either by acts of the parties or otherwise. It must be a contractual relationship existing between the parties. A statement is not at law an account stated unless both parties have agreed, by a contract arrangement or by their own actions, that it is correct.

Here, there has been no agreement as to the debt owed. Carter Lumber has asserted via the affidavit of its attorney that the books of Carter Lumber reflect an obligation of Echelon Homes. As demonstrated by Echelon's lawsuit against Carter Lumber, which was filed prior to the claim for an account stated, Echelon vehemently disagrees that it owes any money to Carter Lumber, and, in fact, Echelon argues that it is entitled to a judgment against Carter Lumber.

There is no writing executed by Echelon reflecting any obligation of Echelon and there has been no meeting of the minds on the issue of the debt. Thus, Carter Lumber has no claim for an account stated.

The affidavit of Carter Lumber's counsel may be *prima facie* evidence of a claim but this evidence was rebutted by the submissions of Echelon.<sup>5</sup> Moreover, prior to filing its claim, Carter Lumber was in possession of Echelon's lawsuit, which clearly established Echelon's contention that it did not, in fact, owe any amounts to Carter Lumber.

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<sup>5</sup> Carter Lumber suggests that the affidavit requires a jury trial. Why? If Carter Lumber has no evidence to support the bald assertions in the affidavit why is a court required to go through the futile act of a trial? Is a jury really going to believe that the affidavit of Carter Lumber's attorney proves anything? Can a jury really be allowed to find an account stated based upon the bald assertions of the attorney where no evidence exists to support the elements of a claim for an account stated?



Thus, Carter Lumber's affidavit was meaningless when filed and could not have been based upon any fact in good faith.

**IV. Carter Lumber Cannot Claim That Wood Was Vested With "Apparent Authority" To Act On Echelon's Behalf**

Carter Lumber has asserted that Echelon is responsible for Wood's actions in her capacity as agent because of Wood's "apparent" authority. Carter Lumber is wrong for two reasons. First, Carter Lumber's claim for an "account stated" is a question of consent and not agency. See Larsen, 344 Mich. at 288.

Second, even if agency were a factor, there is no competent evidence for a reasonable juror to conclude that Echelon vested Wood with the apparent authority to: (a) change the billing address of the business from Brighton to Highland even though Echelon continued to use a Brighton phone number; (b) authorize delivery of thousands of dollars of goods directly to her home;<sup>6</sup> (c) authorize her brother to purchase goods on Echelon's account and have thousands of dollars of goods delivered to his home; and (d) authorize Wood to have false lien waivers executed by Carter Lumber.

Carter Lumber's Application for Leave proves the validity of the Circuit Court's dismissal of its claim. Specifically, Carter Lumber offers no evidence from the record that would support a finding that Echelon Homes held Wood out to

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<sup>6</sup> This act is particularly troubling considering that Carter Lumber's own credit application expressly forbids the use of the account for "personal, family or household use." App. Exh. 4.

Carter Lumber as someone authorized to purchase building materials or open accounts in the name of Echelon Homes.

The Restatement states that “apparent authority” is: “the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other’s manifestations to such third persons.” *Restatement Agency*, 2d, § 8, p 30. Further,

Apparent authority arises where the acts and appearances lead a third person *reasonably to believe* that an agency relationship exists. [*Alar v. Mercy Memorial Hospital*, 208 Mich. App 518, 528; 529 N.W.2d 318 (1995)]

*See also Meretta v. Peach*, 195 Mich. App. 695, 698, 491 N.W.2d 278 (1992).

However, “apparent authority must be traceable to the principal and cannot established by the acts and conduct of the agent.” *Id.*

Carter Lumber argues it was entitled to rely upon the representations of Wood because she was Echelon’s office manager, she opened the mail, she took Echelon’s phone calls and she prepared the checks to pay Echelon’s bills. However, none of these “duties” was a manifestation of authority communicated from Echelon to Carter Lumber with any intent that Carter Lumber rely upon such “duties” as evidence of Wood’s authority. Nor was it “reasonable” for Carter Lumber to rely upon these duties to conclude Wood had the authority to order building materials and have them delivered to her home and her brother’s home.<sup>7</sup>

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<sup>7</sup> Curiously, Carter Lumber offered no testimony to the Circuit Court, the Court of Appeals or this Court establishing that Carter Lumber did, in fact, believe

Under Carter Lumber's theory, every small business in the State of Michigan must fear a ruling from this Court that having a one person office creates "apparent" authority for the employee to open a credit line and personally charge hundreds of thousands of dollars of goods.<sup>8</sup>

Carter Lumber's claim that Wood had "apparent" authority is even more Incredible when the Court considers Carter Lumber never tried to talk with Mr. Hysen or Mr. Strange about (i) credit approvals, (ii) credit Increases, (iii) the addition of authorized users, (iv) requests to sign false lien waivers or (v) substantial deliveries of goods purchased on Echelon's account to the homes of Wood and her brother.

All Carter Lumber has is the statements of Wood herself. However, it is well established that the representations of a purported agent cannot establish the agent's actual or apparent authority: "In the case at bar, defendants only point to alleged representations by Logan [the agent] to establish the apparent authority. Accordingly, their argument must fail since Logan's representations, if any, cannot be the basis for establishing his own authority." Potomac Leasing Co. v. The French Connection Shops, Inc., 172 Mich. App. 108, 114, 431 N.W.2d 214 (1988).

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Wood had the "apparent authority" to act. Instead, Carter Lumber creates an argument with no evidence that "reasonably" or otherwise it believed Wood was acting on behalf of Echelon.

<sup>8</sup> Imagine the liability that would be created for every small business by the mere fact that leaving an assistant alone in an office automatically vests the assistant with the apparent authority to bind the business owner with respect to all

Indeed, other than her “duties” of answering phones, opening mail and paying bills, Carter Lumber can point to no evidence that the owners of Echelon in any way suggested to the world that Wood was entitled to open charge accounts in the name of the business and was entitled to have those goods delivered to her home. See Cutler v. Grinnell Bros., 325 Mich. 370, 378, 38 N.W.2d 893 (1949) (finding store manager did not have apparent authority to contract for construction work).

Carter Lumber’s arguments also fail as a matter of contract. Carter Lumber’s own documents prove that it could not rely upon Wood’s “apparent” authority as the credit application was purportedly signed by Echelon’s owners<sup>9</sup> and required their consent to make changes to the credit status. App. Exh. 4, Application. Despite this, Carter Lumber **NEVER SPOKE WITH ECHELON’S OWNERS** when Wood (i) had goods delivered to her home; (ii) had credit lines Increased; and (iii) had the address for where invoices were sent changed.

Thus, assuming a binding contract existed for purposes of this argument only, Carter Lumber was the first to breach any alleged agreement with Echelon when it engaged in such reckless conduct: “The rule in Michigan is that one who

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credit accounts opened by the assistant, without the owner’s approval, while the owner was out of the office.

<sup>9</sup> By requiring the signatures of Mr. Hysen and Mr. Strange, although forged, on the application, Carter Lumber expressly recognized that Wood did not have the authority to bind Echelon. Indeed, Carter Lumber’s application states: “Signatories must be a proprietor, general partner or an officer of the company . . .” App. Exh. 4. Wood was none of these things.

first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform.” Michaels v. Amway Corp., 206 Mich. App. 644, 650, 522 N.W.2d 703 (1994), *quoting* Flamm v. Scherer, 40 Mich. App. 1, 8-9, 198 N.W.2d 702 (1972). When Carter Lumber engaged in these acts, it did so at its own peril and cannot seek relief from Echelon.

In sum, Carter Lumber provides no evidence that the “apparent authority” given to Wood to manage Echelon’s office also Included the authority to order *building* materials for Echelon or that office managers routinely order building materials in the home building industry or that office managers normally have thousands of dollars of materials delivered to their personal home or that a reasonably prudent business would accept the representations of an office manager on each of these issues.

Carter Lumber simply provides no evidence that Echelon is responsible for Wood’s fraud as the conduct exceeded her authority.

**V. Carter Lumber’s Statements That Echelon “Ratified” A Debt To Carter Lumber Is “Absurd” And Borders Upon Bad Faith**

Echelon lost over \$500,000 as a result of Wood’s unlawful conduct. Yet, Carter Lumber claims that Echelon “ratified” this theft.

In David v. Serges, 373 Mich. 442, 443-44, 129 N.W.2d 882 (1964),<sup>10</sup> this Court adopted the definition of ratification from *Restatement of Agency*, 2d, §§ 82 and 83 (which the Court of Appeals relied upon in this case):

Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.

and

Affirmance is either

- (a) a manifestation of an election by one on whose account an unauthorized act has been done to treat the act as authorized, or
- (b) conduct by him justifiable only if there were such an election.

Here, Carter Lumber Incidentally claims that because Echelon assisted the Livingston County prosecutor in pursuing its employee criminally, it “ratified” her criminal conduct. This is absurd.

As part of the criminal proceedings against Wood, the Livingston County prosecutor, William McCririe, asked Echelon to compile information concerning the amounts Wood stole from *all* known parties. Indeed, the transcript of the hearing proves this point:

Q (by Mr. McCririe): As a result of the information that you got in preparing for today’s hearing were you able to determine whether or not Echelon Homes and the two principals of Echelon Homes

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<sup>10</sup> Carter Lumber relies upon Lomba v. General Motors Corp., 303 Mich. 556, 6 N.W.2d 890 (1942). However, Carter Lumber Incorrectly cites this case as being from 1992 and not 1942. David, not Lomba is the more recent precedent.

*and some other people* lost money as a result of some conduct of

Ms. Wood?

A: Yes. [App. Exh. 10, p. 6-7 (emphasis added).]

At the restitution hearing for Wood, Echelon correctly stated that Carter Lumber is still looking to Echelon for the balance of the charges made by Wood. Indeed, Echelon's employee testified that she obtained the information regarding the claimed debt directly from Carter Lumber. See Exhibit 11, p. 34.

In short, Echelon, at the request of the Livingston County prosecutor as the main victim of the theft, was simply identifying the scope of Wood's theft.<sup>11</sup>

The deposition testimony of James Hysen also provides no support to Carter Lumber:

Q: Echelon Homes. I'm sorry – that Echelon Homes has outstanding to Carter Lumber is \$26,987.82.

A: *According to Carter Lumber's paperwork*, apparently, yes, that is the outstanding balance. [App. Exh. 10, p. 8, (emphasis added).]

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<sup>11</sup> The Court should note that MCL 780.766, upon which Carter Lumber has previously relied, expressly recognizes that a "threatened" "financial" "harm" makes Echelon a victim for purposes of restitution. Here, the "threatened" financial harm exists with Carter Lumber. This statute, however, does not make Echelon responsible for the "threatened" harm.

First, this testimony on its face only suggests Mr. Hysen was acknowledging Carter Lumber's claim. Second, at most, it recognizes a balance exists but does not admit that the balance is correct. Again, Carter Lumber fails to provide evidence of an "account stated."

As to construction supplies obtained by Echelon from the State Police. These "supplies" had an actual value of around \$7,500 and included goods not necessarily from Carter Lumber. App. Exh. 11, pp. 10-13. At most, Carter Lumber is entitled to a credit against any amount awarded to Echelon against Carter Lumber as a result of Echelon's claims.

Moreover, it can hardly be questioned that Echelon was entitled to these materials where it had already paid Carter Lumber in excess of \$100,000 without ever receiving a single benefit from the payments. Thus, the retained items had already been paid for by Echelon funds. If Carter Lumber had volunteered to return these funds, Echelon would have gladly returned the minimal materials recovered.

There is simply no doubt, as found by the Circuit Court and confirmed by the Court of Appeals, that Echelon did not "ratify" the acts of Wood. Moreover, Carter Lumber's arguments on this point are once again premised on the application of law to fact and not on a claim that the Court of Appeals misstated the law.

The Court should decline to grant leave on this issue.



VI. **Carter Lumber Should Be Judicially Estopped From Asserting Its Claims Against Echelon**

Even If Carter Lumber could state a claim against Echelon for an account stated, it should be judicially estopped from asserting the claim.

The doctrine of judicial estoppel provides that “a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an Inconsistent position in a subsequent proceeding.” Paschke v. Retool Industries, 445 Mich. 502, 519 N.W.2d 441 (1994), *quoting* Lichon v. American Univ. Ins. Co., 435 Mich. 408, 416, 459 N.W.2d 288 (1990). The doctrine applies to situations in which the party subsequently asserting a contrary position prevailed in an earlier proceeding. SCA Services, Inc. v. General Mill Supply Co., 129 Mich. App. 224, 230-231, 341 N.W.2d 480 (1983).

In this case, Carter Lumber asserts that Echelon is responsible for the fraudulent charges of Connie Wood because of an “account stated.” However, Carter Lumber has already *successfully* asserted that the debt was not the result of a legitimate account of Echelon Homes but the result of a theft by third-parties in a lawsuit before Oakland County Circuit Judge Alice Gilbert.

In Oakland County Circuit Court Case No. 00-027900-CK, Carter Lumber filed suit against Connie Wood, Michael Wood, Ronald Lobenstein, Sherrie Lobenstein and Jerry Garrison alleging that these defendants had fraudulently obtained supplies and materials on the account of Echelon. *See* Complaint, App. Exh. 13, ¶¶ 8-16. Carter Lumber went on to allege that the defendants conspired together to defraud Carter Lumber. Complaint, App. Exh. 13, ¶¶ 17-20.

In addition, Carter Lumber, as it does before this Court, asserted a claim for account stated against the defendants and admitted that Carter Lumber “sold and delivered to Defendants<sup>[12]</sup> certain goods, services, wares and merchandise upon open account upon the promise of Defendants to pay.” App. Exh. 13, Complaint, ¶ 22.

Thus, in a lawsuit filed *before* the action now being considered by this Court, Carter Lumber admits that the debt: (1) was created fraudulently by persons other than Echelon; (2) was the obligation of parties other than Echelon; and (3) resulted from the conversion of Carter Lumber’s property by persons other than Echelon.

Critically, Judge Gilbert relied upon these allegations, Including the Affidavit of Mr. Stoychoff, Carter Lumber’s counsel, attached to the Complaint against the Woods and Lobensteins, when she entered Judgment against Sherrie and Ron Lobenstein. See Judgments, App. Exh. 14.

The proof of Judge Gilbert’s reliance is found in the amount of the Judgment. Judge Gilbert entered Judgment against the Lobensteins in the amount of \$80,963.46 (plus interest and costs) even though the amount of the unpaid debt allegedly owed to Carter Lumber was only \$26,987.82. \$80,963.46 is exactly *treble* \$26,987.82. Carter Lumber’s only claim that was subject to a treble damage award was the claim for conversion. See MCL 600.2919a. Thus, Judge Gilbert must have relied upon the allegations that the Lobensteins *converted* Carter Lumber’s

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<sup>12</sup> The term “Defendants” does not Include Echelon as identified in the

property when she entered the Judgments. Therefore, there is at least “some” evidence that “the court in the earlier proceeding accepted [Carter Lumber’s] position as true.” Paschske, 445 Mich. at 510.

If Carter Lumber’s goods were “converted” by the Lobensteins, then the claim that Echelon is somehow responsible under a theory of account stated or contract is inconsistent. This is particularly true where, as here, Carter Lumber makes no claim that Echelon can be responsible for the tortious acts of the Lobensteins under a theory of “apparent authority.” In other words, if the goods were stolen by the Lobesteins, as Carter Lumber successfully asserted, there is no basis for finding that Echelon was contractually obligated to pay for the stolen merchandise.

Moreover, if this Court allows Cart Lumber to recover in this case, Carter Lumber will receive a windfall as it will have a judgment against the Lobensteins for three time the amount of the alleged debt plus a judgment against Echelon for the base amount of that judgment under Inconsistent theories.

Therefore, Carter Lumber should be judicially estopped from asserting its claim for “account stated” against Echelon and the Court should affirm the ruling of the Circuit Court in dismissing Carter Lumber’s claim.

## **VII. The Court Of Appeals Dismissed the Conversion Claim**

Carter Lumber argues that it should not be liable for conversion. The Court of Appeals agreed, and Echelon does not seek leave on this issue.

### VIII. Carter Lumber “Knowingly” Aided And Abetted Wood’s Conversion Or Embezzlement

In its questions presented, Carter Lumber purports to challenge whether it may be liable for aiding and abetting conversion. See Question Presented IV to Carter Lumber’s Leave to Appeal Application. However, the only discussion in its brief concerns a direct claim for “conversion” and does not address a statutory aiding and abetting claim. Moreover, while the statutory claim is referred to as “aiding and abetting conversion,” it was more properly labeled “aiding and abetting conversion OR theft OR embezzlement.” That is, conversion is not a required element of the claim. The following discussion is provided to address what Carter Lumber apparently would have improperly challenged in Question Presented IV had it thought to do so.

It is a basic principle of Michigan law that a person who aids and abets the criminal or tortious conduct of another is jointly and severally liable for the harm caused. See L A Young Spring & Wire Corp. v. Falls, 307 Mich. 69, 101 and 107, 11 N.W.2d 329 (1943) (one who aids and abets a tortfeasor is jointly and severally liable for harm caused by tortfeasor); Tomkovich v. Misteovich, 222 Mich. 425, 192 N.W.2d 639 (1923) *Prosser and Keeton on the Law of Torts*, § 46 at 324 (5th ed. 1984) (all those who lend aid to the wrongdoer are equally liable with him); 1 Cooley, *Law of Torts* 244 (3d ed. 1906) (“All who actively participate in any manner in the commission of a tort, or who . . . aid or abet its commission, are jointly and severally liable therefore”); *Restatement (2d) Torts*, § 876. See also Whitney v. Citibank, NA, 782 F.2d 1106 (2d Cir. 1986)

By statute, Michigan provides that a party who aids and abets in a conversion, theft or embezzlement is liable for that conversion, theft or embezzlement:

A person damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney's fees. This remedy shall be in addition to any other right or remedy the person may have at law or otherwise. [MCL 600.2919a]

Pursuant to MCL 600.2919a, the critical inquiry is whether the aider and abettor has knowledge of another's conversion, theft or embezzlement. Thus, the proper analysis requires an examination of whether Echelon produced evidence sufficient to create a question of fact for a jury regarding Carter Lumber's knowledge of the Fraudulent Scheme.

*A. Carter Lumber Had Actual Knowledge Of The Fraudulent Scheme*

A jury is entitled to conclude that Carter Lumber had actual knowledge of the Fraudulent Scheme as demonstrated by Carter Lumber's execution of the false lien waivers and acceptance of the title company checks for jobs Carter Lumber knew it never delivered materials to.

Indeed, the knowledge of Carter Lumber's employees is attributable to it for purposes of liability. See People v. American Med Ctrs of Michigan, Ltd, 118 Mich. App. 135, 324 N.W.2d 782 (1982) (a medical clinic was convicted of medical fraud based on knowledge of employees); Upjohn v. New Hampshire Ins Co, 438 Mich.

197, 476 N.W.2d 392 (1991) (combined knowledge of corporate employees may be imputed to a corporation); Gordon Sel-Way v. Spence Bros, Inc, 177 Mich. App. 116, 124; 440 N.W.2d 907 (1989), *aff'd in part and rev'd in part on other grounds*, 438 Mich. 488 (1991) (combined knowledge of employees may be imputed to a corporation).

There is ample evidence for a jury to conclude that Carter Lumber had knowledge of the Fraudulent Scheme and aided and abetted Wood by, among other things, allowing her to:

- open an unauthorized credit account (Application, App. Exh. 4);
- Increase the credit line on the account by over \$30,000 in a one year period (Rink's Dep., App. Exh. 3, pp. 80-81);
- appoint whomever she chose as authorized persons for use of the account (Lobenstein Dep., App. Exh. 5, pp. 29-31 and Receipt, App. Exh. 6);
- have unauthorized users charge on the account (Lobenstein Dep., App. Exh. 5, pp. 29-31 and Receipt, App. Exh. 6);
- change the billing address of the account to an address she controlled (Invoices with false address, App. Exh. 7); and
- have tens of thousands of dollars of goods delivered to her personal home and that of her brother, Ron Lobenstein (Lobenstein Dep., App. Exh. 5, pp. 29-31 and Rinks Dep., App. Exh. 3, pp. 42-43).

Carter Lumber allowed all of this without once contacting the owner's of Echelon even though Echelon was among the store's best customers. (Rinks Dep., App. Exh. 3, pp. 79-80.)

Moreover, to secure its unlawful payments, Carter Lumber signed lien waivers for projects to which it had no knowledge of ever having provided goods. (False Lien Waiver, App. Exh. 9 and Rinks Dep., App. Exh. 3, pp. 92-93.) In short, Carter Lumber engaged in active fraud to facilitate the theft of Echelon's property.

Thus, a jury should be allowed to review the direct evidence of misconduct possessed by Echelon, including the execution of lien waivers for which Carter Lumber had no evidence to support, to determine whether it had "knowledge" of the Fraudulent Scheme.

***B. At A Minimum, Carter Lumber's Knowledge Can Be Found From Its Duty To Inquire Into The Fraudulent Acts And To Not Act With Willful Blindness***

It was on this basis that the Court of Appeals found that Echelon had ample evidence to support its claims.

Courts have frequently found "knowledge" for imposing criminal liability where a defendant acted with willful blindness or was on inquiry notice of facts a reasonable person would have discovered. *See, e.g., United States v. Prince*, 214 F.3d 740, 759-60 (6th Cir. 2000) (affirming willful blindness instruction to find criminal liability in a case requiring knowledge).

In Thomas Estate v. Manufacturers Nat'l Bank of Detroit, 211 Mich. App. 594, 601, 536 N.W.2d 579 (1995) the court held that "[k]nowledge of facts putting a

person of ordinary prudence on inquiry is equivalent to actual knowledge of the facts which a reasonably diligent inquiry would have disclosed.” *See also Estate of Goldman v. Nat’l Bank of Detroit*, 236 Mich. App. 517, 523, 601 N.W.2d 126 (1999)) In Thomas Estate the defendant bank was in possession of a document that, if reviewed, would have provided it with the information it claimed not to possess. The court found that the failure to conduct a reasonable diligent inquiry was no excuse for the bank’s actions, and the bank was found to have knowledge of the relevant information.

The Thomas Estates opinion cites this Court’s decision in Hudson v. O&A Electric Co-Operative, 332 Mich. 713, 52 N.W.2d 565 (1952) in support of its holding. There, this Court acknowledged that a company may not close its eyes to the facts before it and expect to avoid being charged with knowledge of the very facts so ignored:

A person is chargeable with constructive notice when, having the means of knowledge, he does not use them. If he has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries and does not make, but studiously avoids making, the obvious inquiries, he must be taken to have notice of those facts which, had he used ordinary diligence, would have been readily ascertained. [*Id.* at p. 716.]

Here, Carter Lumber possessed information that was, at a minimum, highly suspicious and requiring further inquiry, Including, but not limited to: (1) requests to sign false lien waivers (Rinks Dep., App. Exh. 3, pp. 92-92 and App. Exh. 9, False Lien Waiver); (2) a request to change the billing address to Highland where Echelon was known to be a Brighton company (App. Exh. 7); (3) the numerous deliveries of



thousands of dollars of materials to the home of an Echelon employee in Pontiac (Lobenstein Dep., App. Exh. 5, pp. 29-31 and Rinks Dep., App. Exh. 3, pp. 42-43); and (4) the use of the "Echelon" account by unauthorized persons (Lobenstein Dep., App. Exh. 5, pp. 29-31 and Receipt, App. Exh. 6).

In short, ample evidence was presented to the Circuit Court to support that, at a minimum, a factual issue regarding Carter Lumber's knowledge existed and should be presented to a jury.

Again, Carter Lumber does not discuss this claim and provides no reason as to why leave should be granted.

#### **IX. Carter Lumber Committed Fraud**

The Court of Appeals concluded that Echelon could present a claim for fraud.

Fraud consists of:

the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. Diponio Construction Company, Inc. v. Rosati Masonry Company, Inc., 246 Mich. App. 43, 51, 631 N.W.2d 59 (2001)

Here, Carter Lumber represented that it delivered or supplied goods to legitimate Echelon construction projects when it signed the false lien waivers and when it accepted checks from the title company. *See False Lien Waiver*, App. Exh. 9 and *Checks*, App. Exh. 8.

These representations were false. Carter Lumber had no information to suggest that it supplied goods to any home for which it signed lien waivers or for which it accepted checks as payment from the title company. Rinks Dep., App. Exh. 3, pp. 89-93.

Because Carter Lumber had absolutely no information to suggest its statements were truthful, it acted, at a minimum, recklessly in making the assertions found in the lien waiver and in the acceptance of the title company checks. Papin v. Demiski, 17 Mich. App. 151, 156, 169 N.W.2d 351 (1969) ("If one obtains the property of another, by means of untrue statements, though in ignorance of their falsity, he must be held responsible as for a legal fraud." *quoting* Justice Cooley in Converse v. Blumrich, 14 Mich. 109, 123 (1866), *aff'd* 383 Mich. 561, 177 N.W.2d 166 (1970)). Clearly, the Circuit Court's focus on "intent" is an insufficient basis for dismissing the fraud claim where Carter Lumber acted recklessly.

Further, Carter Lumber knew that the lien waiver would be used by Echelon and its agents to withdraw funds from Echelon Homes' construction accounts and Carter Lumber intended that Echelon Homes rely upon the statements. Carter Lumber intended that Echelon Homes would rely upon Carter Lumber's representations that it was entitled to cash the checks issued by the title company to Carter Lumber.

In reliance upon Carter Lumber's representations, Echelon Homes issued checks to Carter Lumber from its construction accounts and honored checks issued to Carter Lumber from its construction accounts.

Carter Lumber's sole, fact based, argument is that its manager denied having known of the scheme. This statement ignores the fact that knowledge may be proven by willful blindness and that fraud may be committed by reckless conduct.

Carter Lumber also ignores its own admission that a fraud was committed against the title company when Wood presented the false lien waivers. Carter Lumber's Summary Disposition Brief at p. 2, App. Exh. 14.<sup>13</sup>

There simply is no error or even hint of a change to Michigan jurisprudence that requires leave on this issue.

**X. Carter Lumber Is Liable For Aiding And Abetting Wood's Breaches of Fiduciary Duty**

Finally, Carter Lumber claims that it should not be sent to trial on an aiding and abetting breach of fiduciary duty claim. Carter Lumber does so by just ignoring the Court of Appeal's Opinion in this case and by ignoring the precedent on which the Court of Appeals relied.

First, Carte Lumber suggests why Echelon has not stated a claim for "civil conspiracy." However, Echelon has not asserted a civil conspiracy claim and the

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<sup>13</sup> Carter Lumber simply cannot argue that it was "duped" into signing a lien waiver where it had no evidence that it ever supplied goods to the homes for which

Court of Appeals never addressed a civil conspiracy claim. Instead, the Court of Appeals recognized the separate and distinct claim for aiding and abetting a breach of fiduciary duty. Opinion, pp. 10-11. The fact is, Carter Lumber did aid and abet Wood's in breaching her fiduciary duties.

Echelon's trusted employee and agent, Wood, was a fiduciary of Echelon. As such, Wood owed a duty of good faith to Echelon and was not permitted to act for herself at Echelon's expense. Production Finishing Corp. v. Shields, 158 Mich. App. 479, 486-487, 405 N.W.2d 171 (1987) Michigan Crown Fender Co. v. Welch, 211 Mich. 148, 159-160, 178 N.W.2d 684 (1920) Central Cartage Co. v. Fewless, 232 Mich. App. 517, 524-25, 591 N.W.2d 422 (1999)

Moreover, by assisting Wood in her breaches, Carter Lumber may also be held liable. See 1 Cooley, *Law of Torts* 244 (3d ed. 1906) ("All who actively participate in any manner in the commission of a tort, or who ... aid or abet its commission, are jointly and severally liable therefor"); Prosser, *Law of Torts* 292 (4th ed. 1971) ("all those who . . . lend aid . . . to the wrongdoer . . . are equally liable with him"); *Restatement (2d) Torts*, § 876 ("[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other. . . .").

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the lien waivers were signed. Rinks Dep., App. Exh. 3, pp. 89-93. Moreover, even if "duped," its actions were reckless.

The Court of Appeals, relying upon, among other cases, Hayes-Albion Corp. v. Kuberski, 421 Mich. 170, 187, 364 N.W.2d 609 (1984), confirmed that Michigan recognizes the claim asserted by Echelon.

There is simply nothing novel about the Court of Appeals' decision on this issue and Carter Lumber does not even attempt to identify one. Leave, therefore, should be denied.

#### CONCLUSION

For the reasons stated above, this Court should deny leave to appeal in this matter.

Respectfully submitted,

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